

Circuit City Stores, Inc. and United Food and Commercial Workers, Local 1776, Petitioner. Case 4-RC-18919

July 31, 1997

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered objections to an election held October 12, 1996, and the hearing officer's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 40 for and 56 against the Petitioner, with 4 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations,¹ and finds that the election must be set aside and a new election held.

We agree with the hearing officer that the Employer's store manager, Robert Mainart, engaged in objectionable conduct warranting setting aside the election. We do so for the following reasons.

As found by the hearing officer, starting about 3 days before the election and continuing until the day of the election, Mainart distributed to unit employees coffee mugs bearing the slogans "Vote No" and "Just Vote No." Mainart individually approached each employee, shook the employee's hand, asked to employee to vote no, and handed the employee the mug. Initially, the mugs did not contain the employee's name, but Mainart later labeled the remaining mugs with employees' names in order to keep track of which employees had not yet received a mug. Mainart distributed a total of about 80-90 mugs, 70 or 75 of which were distributed with employees' names on them.

Under established Board precedent, employers may make antiunion paraphernalia available to employees at a central location, provided that supervisors are absent from the distribution process and there is no other coercive conduct in connection with the distribution. *Barton Nelson, Inc.*, 318 NLRB 712 (1995); *Gonzales Packing Co.*, 304 NLRB 805, 815 (1991). However, employers are precluded from creating situations in which employees are forced to disclose their union sentiments. *Lott's Electric Co.*, 293 NLRB 297, 303-304 (1989), enf. mem. 891 F.2d 281 (3d Cir. 1989). Thus, employers may not distribute campaign paraphernalia in a manner pressuring employees to make an observable choice that demonstrates their support for or rejection of the union. *A. O. Smith Automotive*

Products Co., 315 NLRB 994 (1994). In *A. O. Smith*, the Board found that by having its supervisors directly offer employees antiunion paraphernalia, the employer effectively put employees in a position of having to accept or reject the employer's proffer and thereby make an observable choice that would reveal something about their union sentiments.

The Employer argues that because the mugs were handed out in a manner which precluded the employees from rejecting them, the employees were not placed in a position where they had to make an observable choice revealing their union sentiments. We reject that argument. Although the employees were not asked if they wanted a mug, we find that Mainart's direct supervisory proffer of antiunion campaign paraphernalia created a situation in which employees would reasonably believe that a refusal to accept the mug would be construed as a rejection of the employer's position in the campaign. See *Barton Nelson*, supra, in which an employer's supervisory distribution of hats to unit employees was objectionable even though some of the employees were not given the opportunity to reject the hat.

Although not dispositive, we also find that the names on the mugs added to the coerciveness of the Employer's conduct. Under such circumstances, employees could reasonably believe that Mainart would be able to identify union supporters by looking at whether the mugs were accepted by the employees, as well as whether they displayed or used them.

We further find this case distinguishable from *Jefferson Stores*, 201 NLRB 672 (1973), relied on by the Employer, in which the Board found the supervisory distribution of "vote no" cards not coercive because the cards did not come with pins to attach them to clothing and the employees were under no compulsion to wear them. As the trial examiner noted in *Jefferson Stores*, the "vote no" cards involved in that case are analogous to campaign fliers and other types of campaign literature, which an employer is free to hand out during the campaign, because it is not "displayed" in such a manner that the employer can use it as a measure of an employee's support of its antiunion message. Id. at 677. Although the mugs here were not intended to be worn, it is obvious from their nature, that as coffee cups they were intended to be used or displayed, and an employee could reasonably believe that the employer would be able to ascertain some information about his union sentiments by the employee's use or nonuse of the mug.² Accordingly, we find this case to be more analogous to the antiunion paraphernalia cases

¹In the absence of exceptions the Board adopts, pro forma, the hearing officer's recommendation that Petitioner's Objection 2 be overruled.

²Unlike our dissenting colleague, we find irrelevant any issue of whether the Employer actually kept track of the mugs. Employees would be well aware of the fact that the Employer had the potential to do so.

than to the distribution of “vote no” cards or other types of campaign fliers or literature.

For these reasons, we conclude that Mainart’s individualized distribution of the mugs to each of the employees reasonably tended to interfere with employee free choice in the election. Accordingly, we shall set aside the election and direct that a new election be held.

[Direction of Second Election omitted from publication.]

MEMBER HIGGINS, dissenting.

Contrary to my colleagues and the hearing officer, I do not find that the Employer’s distribution of “Vote No” mugs to employees before the election constitutes the objectionable conduct. Accordingly, I would overrule the Union’s objections and certify the results of the election.

The facts are undisputed. In the days preceding the election, the Employer’s store manager, Mainart, shook the hands of individual employees, reminded them to vote, and handed them mugs with the “Vote No” logo. Mainart did not ask employees whether they wanted the mugs, inquire whether they supported the Employer or, indeed, solicit how they intended to vote. Further, although Mainart marked many mugs with employees’ last names, he did so only in order to remind himself which employees had not yet been given the mugs. There is no evidence that the Employer intended that the mugs be displayed or used at the work site. Nor is there any evidence that the Employer kept track of who displayed and used them and who did not do so. To the contrary, Mainart testified, without contradiction, that no such monitoring occurred.

It is well settled that the Board does not apply a *per se* test when determining whether employer distribution of antiunion paraphernalia is objectionable. Rather, it examines the totality of the circumstances. *Barton Nelson, Inc.*, 318 NLRB 712 (1995). Under this test, I would find the Employer’s conduct unobjectionable. Thus, Mainart presented the mugs to employees in a manner which did not solicit employees to disclose their sentiments for or against the Union. Nor were employees asked whether they wanted a mug. The

mug was simply thrust on them. Thus, employees were not put in the position of having to make an observable choice regarding their Union sentiments. Cf. *Gonzales Packaging Co.*, 304 NLRB 805 (1991). And, because mugs are not like hats, buttons, or other paraphernalia which are worn, employees would not, by subsequent conduct, be required to make observable an choice. Cf. *A. O. Smith Automobile Products*, 315 NLRB 994, 998 (1994); *Lott’s Electric Co.*, 293 NLRB 297, 303 (1989), *enfd. mem.* 891 F.2d 281 (3d Cir. 1989). Thus, in my view, mugs are akin to antiunion cards, literature, or other materials that are not designed to be worn, and which employers freely can distribute to employees without interfering with an election. See *McIndustries*, 224 NLRB 1298, 1299–1300 (1976).

The majority contends that it was “obvious” that the mugs were to be used or displayed. While it may be that they were intended to be used, it is *not* obvious that they were to be used or displayed *at work* and there is no evidence to support a contention that this was the Employer’s intent. On the contrary, when distributing the mugs, the Employer did not invite employees to use or display them at work.

My colleagues say that there was a “potential” that the Employer would keep track of which employees used or displayed the mugs. Although there may be such a “potential,” the uncontradicted testimony is that in fact no monitoring occurred. In such circumstances, I would not use mere “potential” as a basis for finding that the distribution of the mugs was objectionable.

Finally, I do not find the fact that a number of the mugs remained in the work place after Mainart distributed them warrants a contrary result. As previously stated, there is no evidence that the Employer examined the mugs to gauge employee sentiments, or that employees would reasonably perceive that it did. In these circumstances and particularly in the absence of other unlawful or objectionable conduct,³ I would not find that the Employer’s conduct warrants a new election. Accordingly, I would certify the election results.

³ Cf. *Kurz-Kasch, Inc.*, 239 NLRB 1044 (1978).